

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 10, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2013AP442-CR
2013AP443-CR**

**Cir. Ct. Nos. 2011CF1361
2011CF3253**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT D. FOSTER,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Milwaukee County: REBECCA F. DALLET and ELLEN R. BROSTROM, Judges. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Robert D. Foster appeals from judgments of conviction, entered upon his guilty pleas, on one count of pandering/pimping, one

count of soliciting prostitutes, and one count of conspiracy to commit felony intimidation of a witness. He also appeals from an order denying his postconviction motion for a *Machner*¹ hearing and plea withdrawal. Foster contends the State breached the plea agreement. We disagree and affirm the judgments and order.

¶2 On March 28, 2011, Foster was charged with one count of trafficking of a child and one count of soliciting a child for prostitution, both as party to a crime, in Milwaukee County Circuit Court case No. 2011CF1361. On July 15, 2011, he was charged with one count of conspiracy to commit felony intimidation of a witness and one count of soliciting prostitutes, both as a repeat offender, in Milwaukee County Circuit Court case No. 2011CF3253. The circuit court granted a motion to consolidate both cases.²

¶3 Foster and the State negotiated a plea agreement. Foster would plead guilty to three amended, non-child-related offenses. The State would dismiss the fourth charge and the repeater allegations, and would recommend a global sentence totaling eleven years' imprisonment: four years of initial confinement and seven years of extended supervision. Foster pled guilty to one count of pandering/pimping, one count of soliciting prostitutes, and one count of conspiracy to commit felony intimidation of a witness. The State made its eleven-year recommendation. The circuit court imposed four years' initial confinement and seven years' extended supervision for pandering, three years' initial confinement and three years' extended supervision for solicitation, and four years'

¹ *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

² The circuit court also consolidated the cases with a third case, that of a co-defendant.

initial confinement and five years' extended supervision for conspiracy, all to be served concurrently.³

¶4 Foster filed a postconviction motion for a *Machner* hearing and to withdraw his plea, asserting the State had breached the plea agreement by repeatedly referring to the victim's age.⁴ The circuit court concluded that "[t]he fact that child-related crimes were removed from the table as part of the plea agreement did not preclude the prosecution from commenting on the involvement of a juvenile in this case." It therefore denied the motion without a hearing.

¶5 "[A]n accused has a constitutional right to the enforcement of a negotiated plea agreement." *State v. Williams*, 2002 WI 1, ¶37, 249 Wis. 2d 492, 637 N.W.2d 733. To be actionable, a breach of a plea agreement must be material and substantial, not simply technical. *See State v. Duckett*, 2010 WI App 44, ¶8, 324 Wis. 2d 244, 781 N.W.2d 522. Whether the State committed a material breach of the plea agreement is a question of law we review *de novo*. *See id.*, ¶6.

¶6 Foster's trial attorney did not object to any perceived or potential breach at sentencing; therefore, Foster has forfeited any direct review of an alleged breach. *See State v. Howard*, 2001 WI App 137, ¶12, 246 Wis. 2d 475, 630 N.W.2d 244. For that reason, Foster's postconviction motion alleged ineffective assistance of trial counsel, for that attorney's failure to raise a contemporaneous

³ The pleas were accepted, and sentence imposed, by the Honorable Rebecca F. Dallet. The Honorable Ellen R. Brostrom reviewed and denied the postconviction motion.

⁴ The motion also sought resentencing because the seven years of initial confinement on the pandering charge exceeded the statutory maximum. The postconviction court commuted the supervision term to the five-year maximum but declined to have a full resentencing hearing. That decision is not challenged on appeal.

objection. *See State v. Naydihor*, 2004 WI 43, ¶9, 270 Wis. 2d 585, 678 N.W.2d 220. To succeed on an ineffective-assistance claim, the defendant must show counsel’s performance was deficient and prejudicial. *See id.* However, if the State did not breach the plea agreement, then trial counsel’s failure to object was not deficient performance, and Foster would not be entitled to a *Machner* hearing. *See Naydihor*, 270 Wis. 2d 585, ¶9; *see also State v. Cummings*, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996).

¶7 On appeal, Foster contends that the State “undercut the plea agreement by conveying to the judge that regardless of the plea agreement, Foster should be sentenced as if he was found guilty of the original charges.” He argues that trial counsel was deficient for failing to object “when the State vocalized multiple prejudicial comments to the alleged victim’s age ... during the State’s recommendation which ‘tainted the sentencing process.’” Foster says he counted “no less than twenty references” to the victim’s age by the State’s use of terms like “child,” “girl,” “juvenile,” or “15 year old.” The problem with Foster’s complaint, however, is that he has not shown that the plea agreement actually called for the State to refrain from discussing the victim’s age.

¶8 In the appellate brief, Foster says the plea required him “to plead guilty to three charges, but the charges would not include any child-related offenses.... The amendment to not include child[-]related offenses was relied upon by Foster in reaching his decision to plead guilty, as it would limit further consequences from his guilty pleas.” Nothing in this characterization of the plea agreement says that the State agreed to refrain from discussing the victim’s age.

¶9 The plea questionnaire form filed in case No. 2011CF1361 lists the following as terms of the plea: “global settlement with 11CF3253,” “dism[iss] all

counts—amend to new charges,” “State will rec[ommend] 4 yrs IC 7 yrs. e.s.,” “standard conditions,” and “Defense free to argue for lesser sentence.”⁵ The transcript of the plea colloquy tracks these conditions, though in more express detail. Neither the plea questionnaire form nor the colloquy transcript reveal any agreement by the State to not mention the victim’s age.

¶10 We also question whether the State could have agreed to hide the victim’s age from the sentencing court. At sentencing, a court is to consider various factors, including the gravity of the offenses. *See State v. Odom*, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. A victim’s age is clearly relevant to that calculus, regardless of the offense charged, and agreements by the State to not reveal relevant information to the sentencing court are void as contrary to public policy. *See State v. McQuay*, 154 Wis. 2d 116, 125, 126 n.3, 452 N.W.2d 377 (1990) (citing *Grant v. State*, 73 Wis. 2d 441, 448, 243 N.W.2d 186 (1976)).

¶11 An agreement not to charge child-related offenses is not the same thing as agreeing not to mention that the victim of charged crimes was a child. We therefore conclude that the State has not committed even a technical breach of the plea agreement, much less a material and substantial one. Accordingly, trial counsel had no basis for an objection, so the postconviction court properly denied Foster’s motion.

By the Court.—Judgments and order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

⁵ We have altered certain capitalizations for consistency.

